In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1209

WILLIAM J. McCARTHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted on three counts of wilfully attempting to evade income taxes in violation of Section 7201 of the Internal Revenue Code. He was convicted on his plea of guilty to one count and was sentenced to one year in prison and a fine of $2,500. The other two counts were dismissed. (Pet. 1a).

Petitioner's contention here is that the trial court, in accepting the guilty plea, failed to make certain that petitioner understood the charge against him. This claim was never made before the trial court either at the time of the plea, at sentencing, or by motion to withdraw the plea.[1] At all events, the cir-

[1] The United States did not argue that the court of appeals should decline to hear the question because of the failure to raise it in the trial court.

cumstances displayed in the record refute the argument.

Immediately before offering the plea, petitioner's retained counsel[2] advised the court that "[t]his is * * * a tax fraud case" (Pet. 12a) and the court, before addressing petitioner, asked the prosecuting attorney, "This is tax evasion * * *?" (Pet. 13a). After the prosecutor responded affirmatively, the following colloquy then took place between the court and petitioner (Pet. 13a–14a):

> The COURT. Mr. McCarthy, your lawyer tells me that you want to enter a plea of guilty to this second Count of this indictment; is that true?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand on your plea of guilty to the second Count of this indictment, you are waiving your right to a jury trial?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand on your plea of guilty you may be incarcerated for a term not to exceed five years?
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> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. You understand you may be fined in an amount not in excess of $10,000?
>
> Defendant MCCARTHY. Yes, your Honor.
>
> The COURT. Knowing all that, you still persist in your plea of guilty?
>
> Defendant MCCARTHY. Yes, your Honor.

Petitioner again stated his willingness to plead guilty when the court, at the request of the prosecutor,

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[2] Different counsel has represented petitioner in the court of appeals and in this Court.

sought to determine whether any threats or promises had been used to induce the plea (Pet. 14a).

We recognize that the trial court did not expressly ask whether petitioner understood what was meant by "tax fraud" and "tax evasion." But this fact does not contravene the requirement of Rule 11 of the Federal Rules of Criminal Procedure that the "court * * * shall not accept such plea [of guilty] * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." There is no set formula of inquiry that must be followed in every case. As the Ninth Circuit said in *Munich* v. *United States*, 337 F. 2d 356, one of the cases cited favorably by the Advisory Committee which formulated Rule 11 (337 F. 2d at 359):

> In determining these questions the court is not required to follow any particular ritual, and it is not necessary that the court personally explain to the defendant the nature of the charge. * * * [Footnotes omitted.]

What the trial judge must do is view all the circumstances before him and determine whether the defendant has the requisite understanding. Here petitioner's repeated declarations that his plea was voluntary, his stated understanding that he could be imprisoned and fined, the fact that he was an experienced businessman, and his counsel's statement (Pet. 12a) that he had "advised Mr. McCarthy of the consequences

of a plea,"[3] all justified the acceptance of petitioner's plea.

Notably, even now petitioner's contention does not focus on the events of the day his plea was accepted. Rather, he contends (Pet. 12–13) that a part of a statement he made two months later, just before the imposition of sentence, shows that he did not understand that fraudulent intent is an element of the crime. But petitioner's statement (Pet. 15a), "I am very unhappy * * * that this happened and I am sure that if it were not for my health * * * that it never would have happened and it is not deliberate * * *," must be placed in the setting of all that was said in court that day. In the colloquy (Pet. 16a–22a) that followed sentencing, petitioner's then counsel sought to persuade the court to suspend the jail term by arguing that the tax evasion was but part of a scheme having as its principal purpose the secreting of funds to buy liquor. Even then, counsel did not assert a lack of criminal intent. He described petitioner's conduct (Pet. 20a–21a) "as gross neglect, and criminal neglect * * * ." The trial judge, in response, stated that he found adequate evidence of unlawful intent in the presentence report's description of petitioner's man-

[3] The court below did not, as petitioner asserts (Pet. 16), read Rule 11 as not requiring the court to address itself to a defendant represented by counsel. The court did (Pet. 9a) "make the general observation that defendant was represented by retained competent counsel who was not confused and did not misunderstand the indictment charge and the consequences of the plea of guilty." The presence of counsel is surely one factor to be considered under Rule 11. See *Munich*, *supra*, 337 F. 2d at 359 n.5.

ner of bookkeeping (Pet. 17a–18a) and the number of years over which petitioner's conduct lasted (Pet. 21a). In these circumstances it was proper to impose sentence on the basis of the guilty plea.[4]

2. There is no conflict (Pet. 9) between this case and *Heiden* v. *United States*, 353 F. 2d 53 (C.A. 9). In *Heiden*, the defendant pleaded guilty, waived counsel, and was sentenced to 20 years in prison for bank robbery. The court of appeals reversed when, in a subsequent proceeding brought under 28 U.S.C. 2255 to set aside the sentence, the defendant testified that he had been led to believe, prior to the plea, that the maximum sentence was only 10 years.

In *Heiden* and in three other cases that petitioner argues are inconsistent with the ruling below, *Munich* v. *United States*, *supra*,[5] *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1), and *Fultz* v. *United States*, 365 F. 2d 404 (C.A. 6), there is no indication that the trial judge addressed any questions to the defendant. In *Hulsey* v. *United States*, 369 F. 2d 284 (C.A. 5), the other case petitioner relies on, the defendant had not in fact pleaded guilty to the charge of transporting in interstate commerce a falsely made and forged security. He admitted "endorsing the check" but in the

[4] In addition, at the time of sentencing the prosecutor stated, and petitioner's counsel agreed, that "[t]he prime consideration" for the government's motion to dismiss Counts 1 and 3 "was an understanding between the parties that all taxes, *penalties* and interest would be paid * * *" (Pet. 16a) (emphasis added). Such an agreement is inconsistent with any notion that petitioner denied fraudulent intent.

[5] In *Munich* the clerk, but not the court, asked if the defendant understood the charge (337 F. 2d at 360), but there was no inquiry as to whether the plea was voluntary.

same breath said, "I don't remember anything about whether it was forged or not" (369 F. 2d at 286). None of these circumstances exist here.*

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1968.

* In *Heiden* and *Hulsey*, the defendant was without counsel; in *Fultz*, counsel was not appointed until the day the plea was offered; and in *Munich*, counsel did not state whether he had advised the defendant with respect to the guilty plea.

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